No. 89-909

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
Petitioner,

v.

UNITED STATES OF AMERICA and
THE FEDERAL DEPOSIT
INSURANCE CORPORATION,
as Receiver for MBANK HOUSTON, N.A.
and THE DEPOSIT INSURANCE BRIDGE BANK, N.A.,
Respondents.

REPLY BRIEF OF PETITIONER SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES

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ATTORNEYS FOR PETITIONER

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REPLY BRIEF OF PETITIONER SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES

Petitioner, Suzan E. Taylor d/b/a Exploration Services ("Taylor"), files this reply brief addressed to the arguments raised in the briefs in opposition filed by Bank One, Texas, N.A. ("Bank One"), the United States, and the Federal Deposit Insurance Corporation ("FDIC"):

Respondents argue that 12 U.S.C. § 91, a statute prohibiting state courts from issuing prejudgment writs of attachment, injunction, or execution against national banks or their property, precludes a successful plaintiff

from perfecting a judgment lien against a national bank. Respondents further argue that the statute can be enforced by an injunction issued on behalf of the Office of the Comptroller of the Currency ("OCC") without proof that the judgment lien would impact the regulatory interests of the United States or threaten irreparable injury to anyone. These arguments are contrary to the plain language of 12 U.S.C. § 91 and to the settled precedent of this Court.

JUDGMENT LIENS ARE NOT PROHIBITED BY 12 U.S.C. § 91

Because the last clause of 12 U.S.C. § 91 prohibits only writs of attachment, injunction, and execution, Respondents have struggled to find a theory to justify extending the statute's prohibition to judgment liens which are encumbrances imposed by operation of statute and not by judicial writ. The theories propounded by Respondents are sometimes inconsistent, often disingenuous, and are generally premised on the erroneous characterization of an abstract of judgment as a "remedy." Abstracts of judgment, when properly filed, create statutory judgment liens; they do not provide a remedy for the collection or enforcement of a judgment. Tex. Prop. Code Ann. §§ 52.001-.007 (Vernon 1984 & Supp. 1989).

Respondents argue that this Court's admonition in *Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312 (1977), that 12 U.S.C. § 91 should not be read literally means that the statute's prohibitions can be extended beyond those included in the unambiguous language used by

Congress. What this Court held in *Impac Ltd.* was that 12 U.S.C. § 91 was not to be read literally so as to prohibit bank debtors from protecting their property with prejudgment writs against national banks. 432 U.S. at 316, 320. That holding does not require that the express prohibitions in 12 U.S.C. § 91 be expanded by a non-literal reading of the statute so as to protect national banks from judgment liens perfected by bank creditors.

The items expressly prohibited by the last clause of 12 U.S.C. § 91 are writs that seize property; judgment liens are not mentioned. Such liens were first introduced to the English legal system by a statute passed in the thirteenth century and were perfected in some of the American colonies prior to the Declaration of Independence. 49 C.J.S. *Judgments* § 454 (1947). Opinions of this Court have discussed judgment liens since at least 1828. *See Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386, 443 (1828). Congress certainly knew about judgment liens when it enacted the last clause of 12 U.S.C. § 91 in 1873; and those liens could have been prohibited by the statute if Congress had intended to do so.

After arguing that Taylor's judgment lien can be enjoined because the statute does not have to be read literally, Respondents, like the court below, then rely on a literal reading of 12 U.S.C. § 91 to support the injunction. Asserting that judgment liens are the functional equivalent of attachments of property, Respondents then note the statute's prohibition of writs of attachment and conclude that judgment liens are likewise prohibited. The United States attempts to

preclude any examination of this argument by saying that this Court must defer to the construction of Texas law by the court below. However, no deference is necessary to a construction that is clearly wrong. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 & n.9 (1985).

A simple comparison of the Texas statutes demonstrates that a judgment lien is not the equivalent of an attachment of realty. The attachment requires the issuance and service of a writ while the perfection of a judgment lien does not. *Compare* Tex. Prop. Code Ann. §§ 52.001-.007 (Vernon 1984 & Supp. 1989) (judgment liens) *with* Tex. Civ. Prac. & Rem. Code Ann. §§ 61.043, 61.061 (Vernon 1986) (writs of attachment of real property). If an abstract of judgment and an attachment of realty both accomplish the same result--the perfection of a lien rather than the seizure of property--neither the writ nor the judgment lien would be subject to the prohibitions of 12 U.S.C. § 91.

Respondents also argue that Taylor's judgment lien was a preference prohibited by the statute. That argument ignores the fact that this Court has held that preferences arising by operation of law prior to insolvency and without contemplation of insolvency are not prohibited. *Scott v. Armstrong*, 146 U.S. 499, 510 (1892). And this Court has recognized the priority of creditors with statutory liens against bank assets. *Ticonic Nat'l Bank v. Sprague*, 303 U.S. at 412; *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 568 (1934). It is simply wrong for Bank One to suggest (Brief, p. 8) that only preferences by way of consensual liens are permitted. *See id.* The United States similarly

misstates the law when it claims on page 7 of its brief that the preferences allowed in *Lewis v. Fidelity & Deposit Co.*, *Merrill v. National Bank*, 173 U.S. 131 (1899), and *Scott v. Armstrong* were not asserted prior to final judgment.

The United States has focused on footnote 18 in this Court's opinion in *Impac Ltd.* as support for its contention that 12 U.S.C. § 91 prohibits any restriction on a bank's right to dispose of its assets. That argument overlooks the fact that a judgment lien does not prohibit the disposition of property or interfere with the use and enjoyment of property. *Baker v. Morton*, 79 U.S. (12 Wall.) 150, 159 (1871); *Massingill v. Downs*, 48 U.S. (7 How.) 760, 767-68 (1849); *Conard v. Atlantic Ins. Co.*, 26 U.S. (1 Pet.) at 443. An injunction, depending upon its language, can deprive a bank of its right to possess, control, or dispose of property.

THE INJUNCTION WAS ISSUED ON BEHALF OF A PARTY WITHOUT STANDING

Bank One attempts to sidestep the standing issue in this case by suggesting that the equitable relief ordered by the trial court was given to Bank One and to the FDIC as receiver. (Brief, p. 10). That is simply not true. The injunction was issued on behalf of the OCC. A later contempt order was signed to enforce the injunction previously issued by the trial court. However, the party who obtained that injunction, the OCC, neither alleged nor proved that it was bringing suit to protect some regulatory interest of the United States. The OCC simply intervened on behalf of a national bank in a private dispute that had no impact on the interests of the United States.

THE OCC NEVER PROVED IRREPARABLE INJURY

Respondents are wrong when they assert that a preliminary injunction can be issued to restrain a statutory violation without regard to equitable considerations and without proof of irreparable injury. This Court has rejected that argument. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542-43 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-16 (1982). There is nothing in 12 U.S.C. § 91, the legislative history of that statute, or in any related statute suggesting that Congress intended for injunctions to issue whenever the statute was violated.

CONCLUSION

By filing her Abstract of Judgment, Taylor perfected a judgment lien against MBank, Houston, N.A. She has never sought to enforce that judgment by a post-judgment remedy prohibited by 12 U.S.C. § 91. There has been no violation of that statute, and no injunction should have been issued on behalf of the United States, a party who failed to plead and prove

grounds for standing or for injunctive relief. The preliminary injunction issued by the trial court should be withdrawn and the case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Reply Brief of Petitioner have been forwarded by messenger to Mr. Robert D. Daniel, Hirsch & Westheimer, P.C., 700 Louisiana, 25th Floor, Houston, Texas, and by United States mail, postage prepaid to the Solicitor General of the United States, Department of Justice, Washington D.C. 20530 on this _____ day of February, 1990.

_____

ROBERT HAYDEN BURNS